United States Court of Appeals

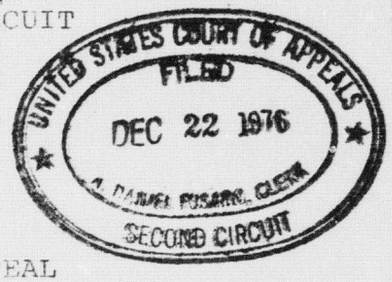
for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-7534

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7534



LOCAL NO. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS AMERICA, AFL-CIO,	:	
Plaintiff-Appellee	:	CIVIL APPEAL
	:	BRIEF AND PORTIONS OF THE RECORD
vs.	:	
N.J. NESMITH CONSTRUCTION CO., A NEW JERSEY CORPORATION, ALSO KNOWN AS N.J. NESMITH,	:	SAT BELOW:
	:	GERALD L. GOETTEL, U.S.D.J.
Defendant-Appellant	:	
	:	

B P/S

BRIEF & APPENDIX

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(201) 383-4340

PAGINATION AS IN ORIGINAL COPY

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STATUTES

PART APPENDIX (White Cover)

(In Order Of Placement)

Opinion of Arbitrator and Record of Proceedings

Affidavit of Norman J. Nesmith

Affidavit of N. Richard Nesmith

EXCERPT OF PAGE 6 - COURT'S OPINION # 45035

EXCERPT OF PAGE 7 - COURT'S OPINION # 45035

STATEMENT UNDER RULE 9 (g) by Plaintiff-Appelle on Motion for Summary Judgment.

DIST/OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	DEMAND S	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKE YR.	DOCKE NUM
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PLAINTIFFS

LOCAL NO. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL-CIO

DEFENDANTS COETTEL, J

NJ. NESMITH CONSTRUCTION CO., a New Jersey Corp. aka N.J. NESMITH

N. J. NESMITH CONSTRUCTION CO., NEW JERSEY CORP., also known as N. J. NESMITH

DEFENDA
Third Party Plai

GURANTEED DOOR CO., INC., QUEEN OF CLOVER CONSTRUCTION CO., AMERICAN GLASS AND METAL INSTALLERS; DAYSON ACOUSTICS INC., ACE CONCRETE WORKS INC., C. & G FENCES, INC, and HAMBOR & HARTUNG, GENERAL CONTRACTO

CAUSE

action to confirm arbitration award 9 USC 9

sls

ATTORNEYS

Guazzo, Silagi and Craner
388 7th Ave, NYC 10019
757-7100

Gersten & Chase, Equitires
21-23 Main St. Newton N.J. 07860
383-1333

CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARI CARD	DATE MAI
	APR 27 1976	69438		JS-5 X	
				JS-6 10-71	

DATE	NR.	PROCEEDINGS
4-27-76	1	Filed complaint and issued summons.
5-10-76	2	Filed summons with marshal's return of service served---N.J. Nesmith Construction by N.S. Nesmith on 4-27-76.
5-14-76	3	Filed ANSWER of deft. N.J.Nesmith Construction Co., Corp of NJ
5-19-76	-4-	Filed Third Party Complaint--summons iss.
5-25-76	-5-	Filed pltf. affirmation and notice of motion for an order granting summary judgment ret. 6-3-76
5-25-76	-6-	Filed pltf's memorandum in support of above motion for summary judgment
6-02-76	-7-	Filed deft's memorandum in opposition to motion for summary judgment
6-04-76	-8-	Filed pltf. reply affirmation to deft's memorandum,
6-22-76	-9-	Filed summons with marshals return served--Hanbor & Hartung, General Contractors by E. Hartung on 6-2-76 Queen of Clover Construction Co., by Mario Valinhas on 5-25-76 Dayson Acoustics Inc. by Mrs Dayson on 5-25-76 Guaranteed Door Co., Inc. by Mrs. Gill on 6-2-76 Ace Concrete Works, Inc. by Feininger on 6-15-76 Ace Concrete Works, Inc. --unable to serve American Glass and Metal Installers by Perfetto on 5-24-76 C. & G. Fences, Inc. by Gail Taschler on 6-8-76
9-02-76	-10-	Filed MEMORANDUM OPINION # 45035 This action is seeking to confirm an arbitration award, rendered against the deft. Pltf now moves for summary judgment The legal fees of $450 for the arbirtation are included in the award itself. The rate if $100 per hour requested by the pltf's atty is excessive contrasted to the arbitration award free. It would, in require an evidentiary hearing to determine its reasonableness. Summary judgment is granted confirming the arbitration award, ---Goettel, J. m/n
9-21-76	-11-	Filed pltf's affdvt. in support of pltf's request for counsel fees
9-30-76	-12-	Filed JUDGMENT #76,891 and ORDER awarding arbitrator's. deft. shall pay to pltf. the sum of $344.66 to be applied $199.54 for wages due to Nevio Perentin and $145.12 due to S. Smolley, deft. shall pay the sum of $3,941.03 to members of pltf., deft. shall pay the sum of $2,144.67 to Carpenters Local 964, and interest shall be added at the rate of six percent (6%) from the date (s) payment should be made. deft. shall pay $450 to R. Silagi, deft shall payto Max J. Miller $756.12, 693.08 to R. Silagi Local 964 have judgment against deft. Nesmith Construction Co. in the amount of $8,329.56 together with interest of $291.06 and the costs of this action to be taxed ---Goettel, J. Judgment entered-930-76--Clerk m/n
10-01-76	---	586 check
10-26-76	-13-	Filed deft. notice of appeal to the U.S.C.A for the Second Circuit from the final judgment entered 9-30-76. Mailed copy Guazzo, Silagi, Craner, Emanueld Gersten and Sidney Gwirtzman.

STATEMENT OF FACTS

N.J. Nesmith Construction a New Jersey corporation, had two contracts of construction to be performed in Clarkstown, New York and West Nyack, New York. The first job was started in January 1975. After finishing the first job and while on the second job in October 1975, Norman J. Nesmith, the sole stockholder and owner of all the stock in said corporation, was approached by a representative of the plaintiff, Union (Mr. Sopko) and was informed that a contract with said Union had been signed and was threatened with procedures of assessing wages for Union carpenters who had not been hired in accordance with said contract.

This was the first time Norman J. Nesmith was informed of this contract and that it had been signed on behalf of the corporation by N. Richard Nesmith, the son of Norman J. Nesmith about ten (10) months previous to that. Neither the son nor any Union representative had up to that time informed Norman J. Nesmith of said agreement. The son, N. Richard Nesmith who was an employee of the said corporation, but not an officer, stockholder nor authorized representative of the corporation, then advised his father in the presence of the Union representative (Mr. Sopko) that when he was approached back in January 1975, by a Union representative(Mr. Sherwood), to sign the contract, he had advised him that he had no authority to sign any contract for the corporation nor the father and requested the Union representative (Sherwood) to wait for his father.

Mr. Sherwood stated that it was only a formality and " didn't mean anything " and refused to wait for the father. Without knowing of this contract, the father completed the job and whenever he had hired Union labor men for this job, he paid the regular wage scale requested of him.

The jobs referred were contracted by the said corporation and not by N.J. Nesmith, individually and the designation in the title of the case is incorrect, since the individual N.J. Nesmith had no connection with the jobs, except as an officer and stockholder of the corporation.

Continuously, throughout this entire procedure, defendant protested there was no agreement valid and the only reason he permitted his records to be audited and attended the hearing was to voice his opinion that he nor the corporation were subject to the agreement, nor any laws involved with arbitration, and that he had paid the regular Union rates if and when he hired a Union laborer. These defendants, had no knowledge of any laws regarding arbitration or its procedures and never felt that a law of New York could require him to arbitrate a matter under a contract which he or it never signed, never knew of it and was never authorized, so that he could not be bound by it. This was also told to the arbitrator and continuously asserted at the hearing.

The arbitrator made the decision that the invalidity or lack of an authorized contract was "sham" and issued his award in favor of plaintiff Union. Defendant has always contended the award is defective.

Upon plaintiff's Motion for Summary Judgment, defendant objected and filed Memorandum and attended the oral hearing in Opposition thereto. The Court rendered an opinion and judgment in favor of the award.

This appeal is taken upon the basis that;

1.) The Court erred in ordering Summary Judgment in face of existing questions of fact, which were also admitted by plaintiff's pleadings and argument for Summary Judgment.

2.) An arbitrator has no power or authority under these circumstances to Judge the validity of an alleged agreement, which appellant persisted is void and was never signed by an authorized party.

LAW AND ARGUMENT

POINT I

The Court erred in ordering a Summary Judgment in face of existing questions of fact, which were also admitted by plaintiff's pleading and argument for Summary Judgment.

A Motion for Summary Judgment must be liberally construed in favor of the party opposing the Motion. The movant for Summary Judgment must demonstrate entitlement beyond a reasonable doubt. This is practically elementary.

- MUSTANG FUEL CO. V. YOUNGSTOWN SHEET etc., 516 F 2d 33

- REDHOUSE V. QUALITY FORD 511 F 2d 230

The plaintiff-appellee based its position and argument upon the assumption that the alleged contract was a valid one, while at all times in these proceedings, the defendant corporation took and maintained continuously that the contract was void.

In METRO-GOLDWYN MAYER etc., V. DE WITT DEVELOPMENT CORPORATION 269 N.Y.S. 104, affirmed 273 N.Y.S. 444, the Court held that when any question is at issue as to the validity of the agreement to arbitrate, the alleged contracting parties cannot be compelled to arbitrate nor can arbitration be granted until said issue is properly determined. Despite the continuous assertions by the defendant that the contract was unauthorized;

that despite without knowledge on the part of the defendant's authorized personnel of the existence of the unauthorized contract defendant submitted statements of payments of special benefits for Union labor, which just happened to have been hired as some of the employees, which statements contained legends, not brought to the corporation president's attention, and which really had no meaning to him under the circumstances, the arbitrator holds same as a contract.

The words "valid agreement" as used in subd. (a) of Section 7503 under "arbitration", McKinney's Consolidated Laws of New York, concerns and contemplates a valid agreement, and if the party who seeks arbitration has knowledge of, or is informed, from the inception of the circumstances of a denial of the validity of the contract, that aggrieved party must apply to prove a valid agreement before he notices the party to arbitrate. Why should one in such a position of not having agreed to arbitrate, not a "resident" or "citizen" of New York, be compelled to "know" he must apply to the Courts to stop the arbitration. He or it is not a party to the contract and therefore not subject to the New York Laws.

The Court, in its opinion filed in this matter (page 6) stated;

"Moreover, the defendant's papers in response to the matter for summary judgment are fatally defective procedurally in that they completely, fail to comply with Local Rule 9 (g) which requires a statement from the party opposing such a motion listing the material facts to which he contends there exists a genuine issue."

The Court then quotes that part of the foregoing rule to the effect that by failure to file such a statement the opposing party admits the statement of the moving party. Here the Court is in gross error for several reasons.

(1) Looking at the statement filed by the movant plaintiff for summary judgment it is glaringly set forth.

> "Material facts as to which moving party contends there are genuine issues to be tried."

Listed under this heading, is among others the invalidity of the agreement under item No. 5. The opposing party therefore did not file an opposing statement under this rule, being willing to admit the (8) eight items which movant admitted were questions of fact and should have denied a summary judgment.

(2) On the motion for summary judgment, movant set forth, the notices etc., the arbitrators award and statement all corroborating the opposing party that there were disputed questions of fact, especially the validity of the contract.

In opposition, defendant produced (2) two sworn affidavits showing the invalidity of the contract. Nothing was produced by movant to counteract these affidavits. Movant especially should have produced, at least sworn proof to deny these affidavits.

POINT II

An Arbitrator has no power or authority under these circumstances to judge the validity of an alleged agreement, which appellant persisted is void and was never signed by an authorized party.

It has been held that it is the role of the Courts to determine the threshold question of whether the parties broadly agreed to arbitrate.

- LEGISLATURE V. ALLEN 1974, 44 A.D. 2d 628, 353 N.Y.S. 2d 554.

Parties cannot be compelled to participate in arbitration unless they have clearly agreed to do so.

- INTERNATIONAL AVIATION ETC., V. FLAGSIM ETC., 1974, 43 A.D. 2d 971, 352 N.Y.S. 2d 223.

Where a party denies ever having validly agreed to arbitration, the right to arbitration must be settled before the arbitration can be directed.

- HOUSEKEEPER V. LOURIE 39 A.D. 2d 280 333 N.Y.S. 2d 932.

This case at bar is replete with denials of the agreement right from the start and it became the duty of the plaintiff to first prove a valid agreement before arbitration.

A party may not be compelled to arbitrate in the absence of a valid agreement to do so.

- RELSE V. LOMBARD 1975, 47 A.D. 2d 327
366 N.Y.S. 2d 493.

- AMERICAN SILK MILLS V. MEINHARD ETC., 1970
35 A.D. 2d 197; 315 N.Y.S. 2d 144.

In the absence of a contract consenting to arbitrate, an award by an Arbitrator is an act of usurpation which is subject to challenge whenever and whereever it is put forward by the usurper as source of rights and duties.

- GLASSER V. PRICE 1970, 35 A.D. 2d 89
313 N.Y.S 2d 1.

- HIRT V. NEW YORK AUTOMOBILE ETC., 1968, 58
Misc. 2d 310, 295, N.Y.S. 2d 142.

It was also held in FEINSILVER ETC. V. GOLDBERG ETC. 1930, 253 N.Y. 382; 171 N.E. 579, that a party who joins in arbitration after reasonable protest has the right to contest the jurisdiction of the arbitrator.

In SUN RAY CLOAK, application of (1939) 250 A.D. 620, 11 N.Y.S. 2d 202.

A very strong case in favor of the appellant here is HESSLEIN AND CO. V. GREENFIELD (1939), 281 N.Y. 26, 22 NE 2d 149, and held that on a petition to confirm an arbitrator's award pursuant to an alleged contract for arbitration and reply affidavits alleging the respondent never entered into the contract nor ever signed it, presented clear question of fact which should have been tried by the Court.

Referring to N.Y.C. P. L. R. 7511 (b), which sets forth grounds for vacating an award, one of the grounds is "(1) (iii) an arbitrator.....or person making the award exceeded his power or.....; "

Since the basic question here was the validity of the contract which defendant denied, it was improper and illegal to hold an arbitration hearing and submit the validity of the contract to the arbitrator, when he had no power to determine that point.

It is very interesting that of the numerous cases cited by the plaintiff, and the trial Judge in the District Court, all of them involve contracts providing for arbitration, the validity of which was not challenged nor was the contract itself contested as in the case at bar. They involved the points of interpretation mostly, or the question of whether certain rates applied, or rebates applied.

For example, the case of BOSTON & MAINE RR V. ILLINOIS CENTRAL 274 F. Supp. 257, 260 S.D. N.Y. affd. 396 F 2d 425 (2d Ar. 1968), cited on page 5 of the Opinion, involved a contract actually and admittedly signed and no dispute as to the contract, and involved the applicability of certain rates and rebates. It is not similiar at all to the case at bar.

In this case there was raised the question of the waiver of the defense to challenge to the arbitration, after participation, but the basic question was not the validity of the contract, but whether the parties bound to the rate award. All these items are distinguishable from our defense here.

CONCLUSION

The award should be vacated and the matter submitted to the trial Court to test the validity of the agreement.

RESPECTFULLY,

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926-1123

December 16, 1976

United States Court of Appeals
Second Circuit * Foley Square
New York, New York 10007

Re: Local 964, Carpenters vs. N.J. Nesmith Construction Co., et al
Case No. 76 Civ. 1899 Appellate Docket # 76-7534

Dear Sir:

Enclosed please find Briefs and copies of the record (3) in accordance with order of the Court entered instead of printing up the Appendix in full. I believe that according to the rules that 30 copies are required for the Court except for the 3 ledgeable copies of the parts of the record referred to in accordance with the said Order.

I am also forwarding 2 copies of same to Opposing Counsel.

Very truly yours,

Emanuel Gersten

EG:DMR
Enc.
C.C. Guazzo, Silagi,
Craner & Perelson, P.C.

P.S. Will you kindly stamp the enclosed copy of this letter to show the filing date and return same in the enclosed self addressed stamped envelope to me.